88-1288

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD PETTY, Petitioner

vs

State of Ohio, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORANRI TO THE COURT OF APPEALS OF THE FIFTH APPELLATE JUDICIAL DISTRICT OF OHIO, RICHLAND COUNTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

REASONS WHY WRIT SHOULD NOT BE GRANTED 7

CONCLUSION 10

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases Cited: Page

Davis v. Florida, 473 U.S. 913 (1985) 9

Irvin v. Dowd, 366 U.S. 717 (1961) 8

Murphy v. Florida, 421 U.S. 794 (1975) 9

STATEMENT OF THE CASE

On February 12, 1987, a search warrant authorizing the Mansfield Police Department to search the offices of the Richland County Sheriff, was issued by Richland County Court of Common Pleas Judge James D. Henson. A number of items were seized pursuant to the search warrant.

The Grand Jury of Richland County indicted Petitioner on Six Counts. Counts One, Three, and Five charged Petitioner with violating Section 2921.32 (A)(1) O.R.C., Tampering with Evidence. Counts Two and Four charged Petitioner with violating Section 2921.32 (A)(4) O.R.C., Obstructing Justice. Count Six charged him with violating Section 2921.32 (A)(5) O.R.C., also Obstructing Justice.

The jury found Petitioner guilty of Counts One, Two, Four and Five; and acquitted him of Counts Three and Six. Petitioner filed a Motion For A New Trial, a Motion For A Judgement of Acquittal, and a Motion For Discharge. These Motions were overruled on July 31, 1987. On the same date, the Court sentenced Petitioner on Counts One and Five to a term of two years; and on Counts Two and Four to a term of one year, the sentences to run concurrently. A fine of $2,000.00 was also imposed. A second Motion For A New Trial filed July 31, 1987 was later withdrawn.

Petitioner filed a motion for leave to appeal to the Ohio Supreme Court. That motion was overruled on November 23, 1988.

STATEMENT OF FACTS

At the time of the events which led to the charges in this case, Petitioner was the Sheriff of Richland County. He was first elected to that office in 1980. (T-472). He was reelected to the position in 1984. Louise Bush, a Mansfield business woman was an active member of the Richland County Democratic Party. She had served as a State Executive Committee member for four years, managed several county campaigns for various statewide candidates, and was Vice-Chairman of the county Democratic Party. (T-469). Petitioner, also a Democrat, asked Bush in 1979 or 1980 to assist him in his upcoming campaign for Sheriff. She agreed and became Co-Chairman of his campaign. (T-470-71).

Bush became a very close friend of Petitioner and his wife. They met frequently for meals and to discuss the campaign. (T-472). They attended functions together and talked regularly about the campaign. After the election, Bush was appointed by Petitioner as a land appraiser for Sheriff's Sales. (T-472). She saw him every Wednesday morning. (T-473). They had many social contacts as well. (T-473).

In 1982, Petitioner considered running for State Senator. He contacted Bush about the possibility. She attended a meeting with Petitioner and advised him on the matter. (T-474). He did not run for the position, which had been her advice.

After his reelection as Sheriff in 1984, Petitioner again considered running for the State Senate. In 1985, he announced he would run for that office. (T-1042). However, Petitioner later withdrew.

Debra Berges, also known as Debra Fenton after her marriage, was the daughter of Louise Bush. She was an employee of the State Auditor, doing local government audits. In 1984, she also owned several apartment buildings and houses in Mansfield. (T-228 - 230). She was also active in the Democratic Party. (T-230-231). She first met Petitioner in 1980 when he ran for County Sheriff. (T-231). In January of 1984, Berges had a serious drinking problem. (T-230). She also had severe financial problems due to her ownership of the various rental properties, which were deteriorating. (T-232).

Berges had a tenant named Ronald Fitch, who was also a part - time employee. He was a handyman and helped in managing the rentals. (T-232-33). Through Fitch, Berges met Ronald Holbrook who became a close friend. He later lived with Berges in her home at 346 Davis Road. (T-233). All three drank together frequently. (T-234).

In January of 1984, Berges suggested to Fitch that she would benefit financially if one of her rental properties burned. (T-234-303). Fitch agreed to this suggestion. On January 29, 1984 while Berges was out of town, Fitch burned one of her vacant buildings located on Bowman Street in Mansfield. (T-235, 305, 306). The fire was investigated by Mansfield Fire Department Arson Investigator Charles Hooks and determined to be an arson. (T-363). At the time, he did not suspect Berges

of any involvement. (T-365).

After the fire, Berges filed a claim with her insurer, Washington Mutual Insurance Company. She was paid $11,900.00 for the building which was a total loss. (T-358). Berges received the insurance money in March. She deposited $10,900.00 in her checking account and paid Fitch $1,000.00 in cash for setting the fire. (T-250, 308). Hooks developed no leads in the case, and no charges were filed.

Ronald Fitch and Ronald Holbrook had another friend named Doug Rush. He also stayed occasionally with Berges at her home at 346 Davis Road. (T-243). During the first half of 1984, Fitch, Holbrook and Rush committed numerous breaking and enterings of commercial buildings in several counties, including Richland County. (T-243, 310). Berges was aware of the activity, but did not participate directly in the break-ins. However, she did have numerous items at her home, and knew that they were stolen. (T-247).

On May 19, 1984, Berges entered an alcoholism treatment program and was hospitalized for 28 days. (T-245). She then severed her close ties with Fitch, Holbrook and Rush. (T-245-246).

Berges returned to her job with the State Auditor as an examiner and during 1984 worked in Richland County. She even audited the Petitioner's Commissary Account during a period of bad weather that winter. (T-248-50). During the 1984 campaign, she helped balance the Petitioner's campaign finance reports with her mother and Petitioner's wife. (T-250).

On October 10, 1984, members of the Richland County Sheriff's Department arrested Fitch, Holbrook and Rush on charges of Theft, Breaking and Entering and other charges. (T-313). None of the three implicated Berges in connection with the receipt of stolen property from the crimes. Charles Hooks again contacted Fitch, who did <u>not</u> divulge to Hooks the truth about the Bowman Street being an arson fire. (T-314-315). Hooks had developed information in August or September of 1984 that led him to suspect Berges may have had some involvement in the fire on Bowman Street. This occurred after an accidental fire occurred in anther of Berges' buildings. (T-367). As a result of this, in late September or early October of 1984,

Hooks spoke with Petitioner and asked for his assistance since he knew of Petitioner's close relationship with Berges' mother, Louise Bush. (T-369). He asked Petitioner to talk to Bush to see if Petitioner could learn anything that could assist Hooks in his investigation. (T-369). Hooks furnished Petitioner with copies of the departmental fire reports concerning the Bowman Street fire. (T-370).

On October 22, 1984 Berges was working at the Richland County Courthouse complex. On that day, Petitioner talked to her in his office. His wife was present taking notes. (State's Exhibit 7). Berges admitted to Petitioner that she had some stolen property in her possession at her home, and that she had paid Fitch for setting the fire on Bowman Street. (State's Exhibit 7). Arrangements were made for Petitioner to meet Berges at her home the following Saturday to recover the property.

On Saturday, October 27, 1984, Petitioner, his wife and stenographer Sylvia Coder went to Berges' home at 346 Davis Road, she was given her Miranda Warnings. (State's Exhibit 5). She gave Petitioner a statement which was stenographically recorded by Coder and later transcribed. (State's Exhibit 6). Berges also surrendered numerous items of stolen property to Petitioner. Petitioner stopped at Louise Bush's house later that day and advised her of the statement. He also claimed that Ron Fitch had implicated Bush. Bush denied involvement and offered to confront Fitch, but Petitioner declined. (T-478-79). Petitioner attempted to interview Fitch, Holbrook and Bush but none made any statements regarding Berges or the Bowman Street arson fire.

Petitioner placed the items in the Sheriff's Department Evidence Room, and partially completed an Evidence/Property Receipt. (State's Exhibit 10). He filled it under the same case number as the Fitch, Holbrook and Rush file, 84-E-656. He also completed a General Offense Report, Number 84-16766. (State's Exhibit 13). However, he did not advise any of his officers of his recovery of the property, nor of the statements that he had obtained from Berges. (T-539, 556, 573). The papers completed in connection with the incident, (State's Exhibits 10 and 13), were not filled out completely. No mention of Berges'

name or of her address were contained in any of the reports.

Petitioner placed the statements, (State's Exhibits 6 and 7), and other items, (State's Exhibit 5, 8, 9, 10, 13, 15, 16, 17, 18 and 19), in a file folder, (State's Exhibit 4), marked Case Number 84-16766. The folder and these items were never seen by any other person until February 12, 1987. Petitioner did not inform Hooks about the confession that he had obtained from Berges. In fact, he denied hearing anything about the fire. (T-374). Fitch, Holbrook and Rush were eventually convicted of various charges in several counties and sentenced to imprisonment. Fitch was paroled on July 9, 1986. (T-319).

In October of 1986, Hooks received a letter from a prison inmate which implicated Fitch in the Bowman Street fire. (T-376). After talking to various officials, including the Judge who had sentenced the inmate who had written the letter, Hooks went to see him with Prosecutor's Investigator Stierhoff on February 4, 1987, (T-378). This led to an interview with another inmate, Brad Bauer. (T-379). At that time, it was decided that the Mansfield Police Department Special Investigative Unit would be asked to assist in the investigation.

On February 9, 1987, Fitch was picked up by Hooks and other officers, and interviewed. He confessed his role in the Bowman Street fire and agreed to cooperate. (T-383-384). The Police Department took charge of the investigation, and taped phone calls between Fitch and Berges, and between Fitch and her husband Rick Fenton. (T-320-23).

On February 11, 1987, Petitioner and his wife were in Florida attending a seminar. Berges had told Bush about the call from Fitch. (T-485). Bush wanted to contact Petitioner. After obtaining his number in Florida from Captain Dale Shelter, she talked to Petitioner on the telephone early on February 11, 1987. (T-487). He advised her to tell Berges to drop out of consideration for appointment as Mansfield City Finance Director.

This position was to be filled at the Democratic Executive Committee meeting that night. (T-488).

On the evening of February 11, 1987, Berges was arrested by the Mansfield Police Department for Arson and Grand Theft. (T-267). She advised the officers of her prior statement to

Petitioner. The officers then attempted to locate the statement by talking to various Richland County Deputies, including Sylvia Coder and Dan Miller. The statements could not be located anywhere in the Sheriff's Department.

A search warrant was obtained to search the office of the Sheriff, which was locked. No other officers had keys to it. (Motion, T-24). On February 12, 1987, the warrant was executed. Captain Shetler, after talking to Petitioner on the telephone, searched Petitioner's desk. He found a file folder (State's Exhibit 4) containing numerous items including the statements made by Berges to him on October 22 and October 27, 1984. (State's Exhibit 6 and 7).

Louise Bush called Petitioner again early in the morning on February 12, 1987, after the search of his office. He told her he was coming back and that, ". . . . . he understood that Debby told everything." They also discussed his need for counsel. (T-507-08).

The Petitioner was later indicted by the Grand Jury of Richland County which led to his trial and conviction on Two Counts of Tampering with Evidence and Two Counts of Obstructing Justice.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petitioner asks this Court to rule that his due process right to a fair trial by jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, required the Trial Court to allow him to conduct an individual voir dire of individual prospective jurors on the issue of pretrial publicity, or a more extensive questioning of the panel. He alleges that the Trial Court's rulings on these points violated his constitutional rights.

It should be noted that at no time during the pre-trial, nor during the trial, did Petitioner seek a change of venue. Nor did he claim in the Appellate Court that a change of venue should have been granted. It is Respondent's belief that this was a conscious trial tactic by Petitioner and his counsel, due to Petitioner's prior political success and persumed personal popularity. Obviously this tactic failed.

Petitioner alleges that the pretrial publicity was prejudicial to him. However, much of the publicity was generated by Petitioner himself, and was favorable to him. For example, he released prior to trial, a report that he had taken and passed a polygraph examination showing that he was innocent.

Petitioner claims that all of the 57 prospective jurors had some exposure to the events prior to the Trial. However, the record demonstrates that several of the jurors had not read anything at all about the case prior to the trial. The record further reflects that the Trial Judge conducted a very extensive voir dire on the issue of pre-trial publicity. He inquired if any had formed opinions prior to the trial. Nine jurors were excused due to having formed opinions due to publicity or other sources which could not be set aside.

The Court made extensive statements about publicity and the need for the jurors to be fair and impartial, and not to allow pretrial publicity to affect their judgment as jurors. Counsel for the state also asked questions regarding pre-trial publicity.

Petitioner's counsel did inquire whether any of the prospective jurors had tried to insulate themselves from publicity. All who responded affirmatively were questioned individually by Petitioner's counsel. At the close of his questioning, he again asked if all jurors could decide the case based upon evidence rather than theories that others or media had discussed. All stated that they could.

Petitioner argues that he was not permitted an opportunity to find out the substance and nature of the juror's knowledge, and that he should have had an opportunity for individual voir dire on this subject. Respondent submits that the record of this case, when evaluated in light of this Court's decisions regarding voir dire, does not support his claim that his due process rights were violated.

As the Petitioner notes, the facts of Irvin v Dowd, 81 S. Ct. 1639 (1961) were quite different from those here. In that case, the defendent had asked for and been granted one change of venue to an adjoining county. He then asked for a second but his request was denied. Eight of the twelve jurors, who later convicted him, had expressed during voir dire, opinions that defendent was guilty of the crime. That was not the case here.

The record here reflects that the jurors ultimately seated all indicated that they did not have any previously formed opinions as to Petitioner's guilt.

This Court recognized that the jurors need not be totally ignorant of the case or issues involved. Rather, the Court held that it was sufficient if a juror could lay aside any impression or opinion and render a verdict based on evidence presented in Court.

In Irvin, the defendant challenged several jurors for cause, but they were not excused. In this case, there were no overruled challenges for cause to the jurors ultimately seated, based on any pre-trial publicity.

Petitioner cites Murphy v Florida, 421 U.S. 794 (1975), for the proposition, that prejudice may be presumed if the influence of the media in the community at large, or in the Courtroom has pervaded the proceedings. However, this Court specifically held that juror exposure or information about a defendant's prior convictions, or about the crime for which he was being tried, did not alone, presumptively deprive a defendant of due process. This Court further noted on page 799:

> "The voir dire in this case indicates no such hostility to Petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside."

This Court found that the petitioner in Murphy failed to show the setting of the trial was inherently prejudicial or that the jury selection process showed actual prejudice. There was no suggestion that an individual voir dire of jurors was constitutionally necessary to determine this issue.

In Davis v Florida, 473 U.S. 913 (1985) this Court denied a petition for a Writ of Certiorari, in which the issue raised was whether the petitioner should have been permitted to conduct individual voir dire of jurors. In the dissent to the ruling, Justice Marshall discussed several lower various Court rulings holding this to be necessary. However, this Court has not adopted that position.

It is Respondent's position that the determination as to whether an individual voir dire of potential jurors is necessary to determine any bias or hostility towards a defendant, is a

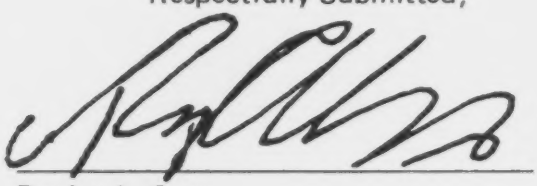
matter to be decided by the trial court on a case by case basis. The mere fact that there has been some publicity, and that a defendant requests it, does not make it a matter of necessity, or a right guaranteed by the United States Constitution. In this case, the record does not show such hostility or bias that made individual voir dire a necessary device to guarantee Petitioner a fair trial. In fact, some of the publicity was favorable to him, rather than adverse.

Clearly, Petitioner's arguments for a Writ of Certiorari are inadequate and the writ should be denied.

CONCLUSION

The record of this case does not support the Petitioner's contention that denial of his individual voir dire request was a violation of his Constitutional rights. Therefore, the writ should not be granted.

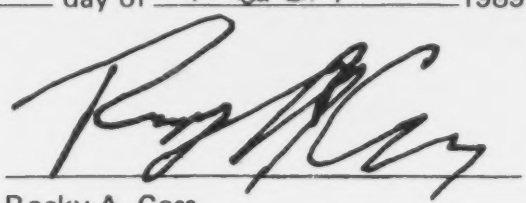
Respectfully Submitted,



Rocky A. Coss
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief was served upon Gary Schweickart, Attorney for Petitioner, by delivery of United States Mail, postage pre-paid at his address. 1243 South High Street, Columbus, Ohio, 43206 - 3445 this 2nd day of March 1989.



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